THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.E.A. No.144 of 2006

Date of Decision: 30.1.2007

M/s. S.B. Packagings Limited **.....Appellant**

v.

Customs, Excise and Service Tax Appellate Tribunal and another **.....Respondents**

CORAM: HON'BLE MR.JUSTICE M.M.KUMAR
HON'BLE MR.JUSTICE VINOD K. SHARMA

***

Present: Mr.Akshay Bhan, Advocate
for the appellant.

Mrs.Daya Chaudhary, Addl. Solicitor General of India
for the respondents.

***

M.M.KUMAR, J.

This appeal filed under Section 35G of the Central Excise Act, 1944 (for brevity, `the Act') is directed against order dated 5.12.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity, `CESTAT') dismissing appeal of the assessee on the principal ground that the assessee was not able to demonstrate to the satisfaction of the CESTAT that it was not in sound financial position to deposit the amount of duty.

The assessee is engaged in manufacturing of exciseable items listed in the first schedule of the Central Excise Tariff Act, 1985. It was issued a show cause notice on 17.9.2002 and demand for a total amount of Rs.43,24,933/- was raised for the period May 2000-2001. The assessee filed its reply to the show cause notice. The Commissioner (Appeals) after hearing the parties recorded a finding

that the assessee had recovered an amount of Rs.43,24,933/- during May 2000-2001 by representing the same as duty of excise on clearance of exempted lay flat tubing but the same had not been paid to the Department and it was recoverable under Section 11D of the Act. It was held that an amount of Rs.3,45,995/- alone has been paid which is to be adjusted in the aforementioned amount. A penalty amounting to Rs.1,000/- was also imposed on the assessee. Aggrieved against the aforementioned order of the Commissioner (Appeals), the assessee approached the CESTAT. Along with the appeal an application by the assessee under Section 11D of the Act was filed with a prayer for waiving of pre-deposited amount of Rs.43,24,933/- and a penalty of Rs.1,000/-. The CESTAT came to the conclusion that the amount recoverable under Section 11D of the Act was not duty as per the stand of the assessee and the provisions of Section 35F of the Act did not apply. However, it stayed the penalty of Rs.1,000/-.

The assessee felt aggrieved and challenged order dated 1.3.2004 before this Court by filing Civil Writ Petition No.8890 of 2004. A Division Bench of this Court set aside the order by holding that the assessee could not be non-suited at the threshold merely on the basis of its stand that the recovery sought to be made was not duty. The operative part of the order reads as under:-

> "We are of the view that the Tribunal erred in dismissing petitioner's application under Section 35F of the Act on the stated ground. It is evident from the order passed by the Commissioner that the aforementioned amount is sought to be recovered from the petitioner as duty to be deposited in the Govt.'s account under Section 11D of the Act. The mere fact that the stand of the petitioner was that being a mere debit entry in the CENVAT account, no amount was due to be deposited in terms of Section 11D of the Act could not be used against it to non suit it at the threshold. The issue has to be adjudicated on the basis of the respective stands of the

parties. If ultimately the stand of the petitioner is not accepted, the petitioner would be liable to deposit the said amount in the account of the Central Govt. as duty. In our opinion, it cannot be said that provisions of section 35F of the Act aren't applicable on facts in hand.

Consequently, we set the impugned order and remand the case back to the Tribunal for consideration of petitioner's app0liciation seeking waiver of pre-deposit."

After remand by the Division Bench of this Court, the CESTAT vide order dated 23.6.2005 directed the assessee to deposit the amount payable as per determination of the Commissioner (Appeals) in its order dated 8.10.2003 (Annexure A-1). On 31.8.2005 the CESTAT dismissed the appeal directed against the order of the Commissioner (Appeals) dated 8.10.2003 on the ground that order dated 23.6.2005 was to be complied with in a period of eight weeks from the date of order and no one had appeared on behalf of the assessee nor any proof regarding deposit of the amount was produced. Accordingly, the appeal was dismissed for non compliance with the provisions of Section 35F of the Act. The assessee again approached this Court by filing Civil Writ Petition No.13529 of 2005 which was permitted to be withdrawn with liberty to bring the additional facts to the notice of the CESTAT and with a prayer to recall its order dated 31.8.2005. The additional facts sought to be brought to the notice of the CESTAT were that the assessee had already gone before the Board of Industrial and Financial Reconstruction (for brevity, `the BIFR') on 24.6.2005 which earlier could not be brought to the notice of the CESTAT. The writ petition was dismissed as withdrawn with liberty to approach the CESTAT. Accordingly, the assessee has again approached the CESTAT and its prayer has been rejected vide order dated 5.12.2005 which reads as under:-

"Interim stay was refused on 23.6.05. It was observed in the

order refusing the interim stay, that prima facie, the applicant had recovered the amount b y way of excise duty from the customers, and, therefore section 11 D of the Act could be invoked. It appears that the application under Sick Industrial Companies (Special Provisions) Act, 1985 was made by the applicant on 24.6.2005. According to the learned counsel for the appellant, the application was sent on 23.6.2005, being the date on which the interim relief was refused. Apart from the fact that the application may have been strategically made of the interim relief being refused, it is clear from the ratio of the decision in Metal Box India Ltd. Vs. Commissioner of Central Excise, Mumbai, reported in 2003 (155) ELT 13 (SC), that payment of pre-deposit covered under section 35F of the Central Excise Act, 1944, does not fall under any of the categories mentioned in Section 22 of the said Act. We may note that before the Hon'ble High Court in C.M.No.16047-48/2005, the learned Counsel for the petitioner made a wrong statement to the effect that the appeal was not listed before the Tribunal for reporting compliance with the pre-deposit order dated 23.6.2005. Thereafter, on 31.8.2005, when the appeal was dismissed for non-compliance with the order, the fact that the case was listed on that date i.e. on 31.8.2005 for reporting compliance of the stay order was clearly recorded in that order. The Hon'ble High Court while allowing the petition for consideration of the application seeking waiver of pre-deposit, made it clear that it did not express any opinion on the merits of other issues raised in the petition and the opportunity was granted to bring aforementioned event of the appellant approaching the BIFR to the notice of the Tribunal."

The CESTAT has placed categoric reliance on a judgment of the Supreme Court in

Metal Box India Ltd. v. Commissioner of Central Excise, Mumbai, (2003)11 SCC 197 for the proposition that merely because an assessee under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for brevity, `the SICA') is registered with the Board, then it was not absolved of the obligation to make payment of the duty. It was held that `payment of pre-deposit covered under Section 35-F of the Central Excise Act, 1944 did not fall under any of the above-mentioned categories postulated by Section 22 of the SICA'.

After hearing learned counsel for the parties, we are of the considered view that the orders of the CESTAT, Principal Bench, New Delhi passed on 5.12.2005 in Appeal No.E/42/04 Ex does not suffer from any legal infirmity warranting acceptance of the prayer made by the assessee. The assessee has been able to delay the compliance of order dated 23.6.2005 passed by the CESTAT directing the assessee to deposit the amount payable under order dated 8.10.2003 (Annexure A-1). The assessee has also not been able to furnish any proof that it is not in sound financial capacity to comply with the aforementioned direction nor excuse of registration with BIFR could come to its rescue as per the judgment of the Supreme Court in **Metal Box India Ltd.'s case (supra).** Therefore, there is no merit in this appeal and the same is dismissed.

(M.M.KUMAR)
JUDGE

(VINOD K. SHARMA)
JUDGE

January 30, 2007.

RC